No. 78-308

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

MOBAY CHEMICAL CORPORATION,
Appellant,
vs.
DOUGLAS COSTLE, Administrator,
United States Environmental Protection Agency,
Appellee.

On Appeal from the United States District Court for the Western District of Missouri

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BRIEF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

on Behalf of The Dow Chemical Company, American Cyanamid Company, Chevron Chemical Company, CIBA-GEIGY Corporation, E. I. duPont de Nemours & Company, Monsanto Company, Rohm and Haas Company, and Union Carbide Corporation

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INTEREST OF THE AMICI CURIAE

This Brief Amici Curiae is filed with the consent of appellant and appellee on behalf of eight significant developers and manufacturers of pesticide chemicals. As part of their normal product development and in order to comply with the registration requirements of the Federal Insecticide, Fungicide and Rodenticide Act, as amended

(FIFRA), each company has expended immense sums of money on research and development to test the safety, efficacy and environmental effects of their products. For example, The Dow Chemical Company alone expended in the past ten years in excess of 50 million dollars in the development of pesticide products and in obtaining registrations and tolerances. The other companies have similarly spent very large sums for such purposes. It is not unusual for testing expenditures on a single product to be seven to ten million dollars. Development costs have increased in recent years but were substantial even in the pre-1970 era. Current costs for redoing early testing would be very great.

The information developed as a result of such research and development, and the methodology employed include valuable trade secrets which give each company "an opportunity to obtain an advantage over competitors who do not know or use it" (Restatement, Torts (1939) § 757, comment b). Each company has developed unique methods of testing and analyses, particularly for the efficacy of the various products,[1] that are preserved in strict confidence. Duplication of the data by competitors would require the expenditure of very substantial time, effort and money and in some cases could not be accomplished without knowledge believed to be possessed by only one company. The EPA has therefore quite properly conceded in this case that the results of such effort and expense are

[1]Appellant has apparently withdrawn efficacy data from consideration by the court below, but amici believe such data are of great importance.

the "property" of the developing company (Jurisdictional Statement, Appx. A, p. 9a).[2]

The statutory provision in question authorizes the EPA to take a company's valuable trade secrets, submitted in support of registration applications prior to 1970, and to make them freely available for reference by its competitors who are seeking current registrations, without even an offer of compensation. That provision is contrary to basic fairness and to the Fifth Amendment. Contrary to the district court's suggestion (Jurisdictional Statement, Appx. A, p. 17a) the companies did not "voluntarily" disclose their valuable trade secrets to the Federal government. They were forced to do so as a condition of doing business. Their disclosure was solely for the limited purpose of satisfying the health, safety and environmental concerns of the registration requirements of the Act. Under the 1975 amendments to FIFRA, however, the agency now proposes, ex post facto, to utilize such proprietary information, not to satisfy the health, safety and environmental concerns of the Act, but for the private benefit of the competitors of the submitting companies.

Prior to 1970, with only isolated exceptions, the Department of Agriculture and the Food and Drug Administration did not permit use of one company's data to support another's registration.[3] When responsibilities under

[2]Despite early dictum possibly suggesting otherwise in *DuPont Powder Co.* v. *Masland* (1917) 244 U.S. 100, it is now settled that trade secrets are correctly viewed as the property of their owner (see *Kewanee Oil Co.* v. *Bicron Corp.* (1974) 416 U.S. 470, 478 (trade secrets are "intellectual property"); see generally, 1 Milgrim, Trade Secrets (1977) § 1.01, reviewing the authorities).

[3]The district court's statement to the contrary (Jurisdictional Statement, Appx. A, p. 21a, fn. 22) is unsupported by anything in the record and is incorrect (infra, pp. 19-20).

FIFRA were transferred to EPA in 1970, that practice changed, and EPA undertook to make the benefits of such research freely available to competitors. The broad-scale 1972 amendments to FIFRA, however, absolutely prohibited the use of one company's trade secrets in support of the registration applications of its competitors, and further required registrants to make "reasonable compensation" for the use of test data that were not trade secrets (86 Stat. 979-980, § 3(c)(1)(D)).

The Congress correctly recognized that "it might be unfair or inequitable for government regulation to require a substantial testing expense to be borne by the first applicant, with subsequent applicants thereby gaining a free ride" (Jurisdictional Statement, Appx. A, p. 15a). It would, in fact, have been unconstitutional. The use restriction and compensation provisions were intended to permit the first applicant for registration to recover its research costs which "may be very great," and thereby to "provide the necessary incentive for the production of safer and better pesticides to protect health and the environment" (S.Rept. No. 92-838, 92d Cong., 2d Sess., pt. II, 1972 U.S. Code Cong. & Admin.News, p. 4034).

Section 3(c)(1)(D) of FIFRA as amended in 1972 quite properly drew no distinction between data submitted before and after 1970, but applied equally to both. In the 1975 amendments to FIFRA, Congress for the first time established a 1970 cut-off date for both the use and compensation provisions of the 1972 Act (89 Stat. 755). Thus, under FIFRA as amended in 1975, registrants are absolutely free to support their own applications by reference to *any* registration data submitted by their competitors prior to

1970, including valuable trade secrets. As to post-1970 data, however, Congress continued the use restriction for trade secrets, and it continued the compensation provision for other test data on the ground that "all persons who wish to profit from the fruits of this expense should have to bear a fair share of the financial burden" (Jurisdictional Statement, Appx. A, p. 15a, fn. 14).

The 1970 cut-off date was purely and simply a legislative compromise, and nothing more. There was and is no constitutional basis for that line of demarcation. The result of the 1970 statutory cut-off date is to permit a company that has expended nothing for necessary research and testing to obtain a free ride at the expense of its competitors simply by incorporating their valuable trade secret data by reference in its own registration application for a product with the identical active ingredient. It is obvious that such a procedure appropriates the valuable property of one company for the private use and benefit of its competitors. At the very least, the Constitution requires that if the trade secret information of one company is taken for the benefit of its competitors, there must be compensation.[4]

The problem is of current importance. Although pre-1970 data is involved, the issue is whether EPA may freely make *current* use of it in support of the registration appli-

[4]The amici believe that such an appropriation of trade secrets is for a private, not a public, use and therefore is absolutely prohibited by the Fifth Amendment (see, e.g., *Thompson* v. *Consolidated Gas Co.* (1937) 300 U.S. 55, 79-80; *Missouri Pacific Railway* v. *Nebraska* (1896) 164 U.S. 403, 417). At the minimum, however, there is a taking for which compensation is required. Since there is a taking without compensation in the instant case, it is unnecessary for this Court to reach the private use question.

cations of competitors of the submitting companies. For many valuable products, data supporting their registration will have been submitted prior to 1970. Examples of this situation are the Chevron Chemical Company products Captan and Dibrom, registrations for which were received for many uses prior to 1970, and which are still valuable products.

Nor is the issue limited to disclosures under FIFRA. As illustrated by *Chrysler Corporation* v. *Brown,* S.Ct. No. 77-922, now pending for decision by this Court, numerous Federal agencies presently purport to authorize the public disclosure of trade secret data of private businesses which they have obtained for regulatory and law enforcement purposes. That is true despite the fact that the Freedom of Information Act expressly exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and despite 18 U.S.C. § 1905 which criminally prohibits such disclosures.[5] The agencies have done so on the theory, adopted by the Third Circuit in *Chrysler,* that the fourth exemption to the Freedom of Information Act is permissive, not mandatory, and that 18 U.S.C. § 1905 may be overriden by agency regulations authorizing disclosure. Although the constitutional issue is not before this Court in the *Chrysler* case,[6] the disclosure of trade secret data

[5]In the Brief for Respondents in the *Chrysler* case, the Solicitor General cites regulations of no less than 17 executive departments and independent agencies which he states authorize the disclosure of exempt materials under the Freedom of Information Act (pp. 26-27).

[6]The Third Circuit in *Chrysler* held that the Fifth Amendment issue was premature in that case because the agency had not finally decided to release the information (565 F.2d 1172, 1193). In this case, Congress has authorized the taking of Mobay's trade secrets, and EPA has used them for the benefit of its competitors.

under authority of such regulations would violate the Fifth Amendment just as do the statutory provisions at issue in the present case.

In addition, the Congress has recently provided for public disclosure of valuable proprietary data under other regulatory statutes. For example, the Toxic Substances Control Act (15 U.S.C. § 2601, et seq.) (TOSCA), enacted in 1976 (Pub.L. 94-469), requires the submission of substantial quantities of trade secret and proprietary data to EPA (§§ 2603, 2604, 2607). The Act authorizes the public disclosure of health and safety studies including underlying proprietary test data (15 U.S.C. § 2613(b)). In addition, TOSCA authorizes disclosure of any trade secret data submitted pursuant to the Act to contractors with EPA (who may be competitors of the supplying company) if "necessary for the satisfactory performance" of their contracts, to the public if the Administrator "determines it necessary to protect health or the environment against an unreasonable risk," or "when relevant in any proceeding under this chapter" in which case confidentiality shall be preserved only "to the extent practicable without impairing the proceeding" (15 U.S.C. § 2613(a)). The constitutionality under the Fifth Amendment of these disclosure provisions is now being litigated in *Polaroid Corporation* v. *Costle* (D.Mass., Civil Action No. 78-1135-S).[7]

[7]In its Memorandum Opinion and Order granting a preliminary injunction against disclosure on June 22, 1978, the district court in *Polaroid* observed:

> "I find that release of the plaintiff's confidential information concerning its twenty chemicals into general trade channels would cause irreparable harm to the plaintiff, of such a drastic nature as to affect its employees and the economy of the immediate area in which it conducts its manufacturing operations. I find that if this confidential information is released as required by the exceptions to the confidentiality requirements

(footnote continued next page)

The provisions of FIFRA and TOSCA and the pervasive disclosure regulations of Federal agencies demonstrate the importance of the constitutional issue presented: the terms on which, if at all, a Federal agency may, pursuant to statute or regulation, take the valuable proprietary information of a business and disclose or use that information for the benefit of its competitors. The question is substantial and for that reason should receive plenary consideration by this Court. For the reasons stated below, this Court should note probable jurisdiction and, after hearing, reverse the judgment of the district court.

ARGUMENT

The district court, although purporting to recognize that trade secrets constitute valuable property to their owners, nevertheless sanctioned the destruction, without compensation, of the essential attribute of such property—the owner's ability to exclude competitors from its unauthorized use. In *Kewanee Oil Co.* v. *Bicron Corp.* (1974) 416 U.S. 470, this Court pointed out that under the "widely relied-upon definition of a trade secret found at Restatement of Torts § 757, comment b":

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know *or use it*" (416 U.S. 474-475) (emphasis supplied).

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listed above, there is a sufficient likelihood that the information will reach general channels of trade as to warrant this court's intervention" (pp. 4-5).

The district court's holding that the Administrator is free to use the trade secrets of Mobay Chemical Corporation for the benefit of its competitors rested on three erroneous propositions:

(1) The court was convinced that the statutory 1970 "cut-off" date for restrictions on the use of plaintiff's data was a valid exercise of Federal regulatory power under the Commerce Clause, and for that reason could not constitute a "taking" within the meaning of the Fifth Amendment (Jurisdictional Statement, Appx. A, pp. 13a-17a).

(2) The court concluded that there could be no "taking" of property even though the Administrator admittedly has appropriated plaintiff's data for the use and benefit of its competitors, on the theory that plaintiff retains the use of its data and the Administrator assertedly had not physically delivered it to plaintiff's competitors (Jurisdictional Statement, Appx. A, pp. 17a-19a).

(3) The court asserted that to compensate plaintiff for current use of its "old" data would constitute a "windfall."

None of these propositions can be squared with the taking decisions of this Court.

I. A REGULATORY STATUTE "TAKES" THE PROPERTY OF A BUSINESS WHEN IT APPROPRIATES IT TO BENEFIT ITS COMPETITORS, EVEN THOUGH THE STATUTE MAY OTHERWISE BE A VALID EXERCISE OF THE COMMERCE POWER.

The court below erroneously asserted that "[a]s long as the means chosen by Congress are reasonably appropriate to the legitimate Congressional purpose for which they are adopted, traditional private property rights must yield

where their exercise interferes with a Congressional proscription pursuant to a legitimate power of Congress" (Jurisdictional Statement, Appx. A, p. 13a). As the court believed that the statute was a valid exercise of power under the Commerce Clause, it therefore concluded that there was no "taking" under the Fifth Amendment.

The court's premise was incorrect. It is elemental that even on the assumption that a statute is within the scope of the commerce power and meets minimal due process standards of rationality, it is subject to the Fifth Amendment requirement that private property not be taken except for a public use and upon the payment of just compensation. The commerce power "must be exercised, when private property is taken, in subordination to the Fifth Amendment" (*United States* v. *Cress* (1917) 243 U.S. 316, 326). As this Court long ago emphasized in *Loan Association* v. *Topeka* (1874) 87 U.S. 655, 664:

> "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law * * *."

The Commerce Clause cases cited by the district court in support of its expansive view of governmental power[8] presented no issue under the Taking Clause of the Fifth Amendment and are irrelevant to the instant case.

[8]The district court relied heavily on such cases as *U.S.* v. *Carolene Products Co.* (1938) 304 U.S. 144; *City of Atlanta* v. *National Bituminous Coal Com'n* (D.D.C. 1939) 26 F.Supp. 606, affirmed (1939) 308 U.S. 517; *Cloverleaf Co.* v. *Patterson* (1942) 315 U.S. 148; and *United States* v. *Darby* (1941) 312 U.S. 100 (Jurisdictional Statement, Appx. A, pp. 13a-14a).

Nor can the district court's decision be sustained, as it assumed, on the principle that an owner's own use of his property is subject to reasonable regulation to promote the public welfare, so long as some reasonable use of the property remains. This case is not remotely comparable to the regulation of use sustained in *Goldblatt v. Hempstead* (1902) 369 U.S. 590 (Jurisdictional Statement, Appx. A, p. 12a), or to the historic preservation law sustained in this Court's recent decision in *Penn Central Transportation Company* v. *City of New York* (June 26, 1978) ——— U.S. ———, 46 U.S. Law Week 4856. The issue here does not simply involve restrictions on an owner's use of his property, but an appropriation of the trade secrets of a private business for the benefit of its competitors. The difference is real and substantial. As this Court recognized in *United States* v. *Cress* (1917) 243 U.S. 316, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking" (243 U.S. 328; see also *Penn Central Transportation Company* v. *City of New York* (June 26, 1978) ——— U.S. ———, 46 U.S. Law Week 4856, 4862; *United States* v. *Causby* (1946) 328 U.S. 256, 266).[9]

The difference between valid regulation of an owner's own use of his property and its appropriation for the benefit of others is illustrated by this Court's decision in *Missouri*

[9]As the court explained in *South Terminal Corp.* v. *Environmental Protection Agcy.* (1 Cir. 1974) 504 F.2d 646, 679, although a "particular use of a parcel of property may be regulated or forbidden," there is a taking where the right to use property is "transferred from the original owner to another person" (504 F.2d 679; accord, see, e.g., *Mugler* v. *Kansas* (1887) 123 U.S. 623, 668-669 (Harlan, J., for the Court)).

Pacific Railway v. *Nebraska* (1896) 164 U.S. 403. The State Board of Transportation had ordered the railroad to permit the installation of a private grain elevator on its right of way. The Board found that existing facilities were inadequate and that installation of the elevator would "not materially affect the defendant in the use of its grounds, or be an unreasonable burden to the defendant" (164 U.S. 409). This Court held that even though the railroad held its right of way "for the public use for which it was incorporated," the order to permit a private third party to enjoy the benefit of the right of way was an invalid taking of private property:

> "[T]he order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States" (164 U.S. 417).

The Court saw the clear difference between regulation of the railroad's facilities or rates on the one hand, and the order in question on the other:

> "Nor does this case show any such exercise of the legislative power to regulate the conduct of the business, or the rate of tolls, fees or charges, either of railroad corporations or of the proprietors of elevators, as has been upheld by this court in previous cases" (164 U.S. 416).

The instant case raises no question as to the validity of the government's legitimate regulatory activity, which requires a business seeking registration to provide the Agency with the information necessary to determine the safety, efficacy and environmental acceptability of the products that the applicant wishes to sell. What is at issue is the statutory provision that additionally authorizes the Administrator to use that proprietary information, not for the proper regulatory purposes of FIFRA, but for the benefit of private competitors who have made no contribution to its development (see also *Thompson* v. *Consolidated Gas Co.* (1937) 300 U.S. 55, 79-80).

For the same reason, the district court's reliance on cases holding that government regulatory programs are not invalid because of the "incidental benefits to third parties" that they may occasion was misplaced (Jurisdictional Statement, Appx. A, p. 21a). This case does not involve "incidental" benefits to others as the inevitable result of the registration scheme (e.g., *Kaukauna Co.* v. *Green Bay &c. Canal* (1891) 142 U.S. 254; Jurisdictional Statement, Appx. A, p. 22a), but the intentional appropriation to competitors of the benefits of registrants' trade secrets. The district court acknowledged that the 1970 cut-off date for protection of registrants' proprietary data is in no way necessary or even related to the safety, efficacy and environmental concerns of the registration program itself (Jurisdictional Statement, Appx. A, p. 17a). It was simply a legislative compromise of the private interests of those companies that wished to protect their valuable research and development efforts from unfair competitive exploita-

tion on the one hand, and those companies that sought to obtain a "free ride" on the other:

> "[I]t appears that the dominant Congressional purpose was to reach a *reasonable compromise between the competing interests of those seeking to register pesticide products* and thereby to end the problems delaying effective implementation of FIFRA" (Jurisdictional Statement, Appx. A, p. 17a) (emphasis supplied).

A statute designed to confer benefits on one segment of an industry at the expense of another may not be sustained on the theory that it confers "incidental" benefits on third parties.

II. A TRADE SECRET IS "TAKEN" FROM A COMPANY WHEN IT IS USED FOR THE BENEFIT OF ITS COMPETITORS.

The district court reasoned that there could be no "taking" of trade secrets and other confidential commercial information so long as the owner also retained their use and they were not physically delivered to its competitors (Jurisdictional Statement, Appx. A, p. 18a). Even if the court were correct in believing that there was no disclosure, its conclusion was erroneous.[10] The very essence of a trade secret consists in the owner's ability *exclusively* to use and control it. The value of a trade secret is that it gives a business "an opportunity to obtain an advantage over competitors who do not know *or use* it" (Restatement, Torts (1939) § 757, comment b) (emphasis supplied). "What is of value is not the idea alone, but the capacity to turn the idea to a productive use" (Milgrim,

[10]The district court's conclusion that the EPA does not actually disclose trade secrets to competing companies was incorrect (see infra, p. 18).

Trade Secrets (1967) § 2.02, p. 2-13). For that reason, "[m]isappropriation of a process, formula or other trade secret matter * * * is generally sanctioned by a restraint on the *use* of the * * * trade secret" (id., § 7.08[1][b]) (emphasis supplied).

The common law protects against the unauthorized disclosure of a trade secret because such disclosure may lead to its unauthorized use. But it equally protects against the unauthorized use, for the benefit of others, of a trade secret by one to whom it has been lawfully disclosed. Comment c to section 757 of the Restatement of Torts provides:

> "c. *Disclosure or use.* One who has a trade secret may be harmed merely by the disclosure of his secret to others *as well as by the use of his secret in competition with him.* A mere disclosure enhances *the possibilities of adverse use.* * * * The rule stated in this Section protects the interest in a trade secret against *both disclosure and adverse use.*
>
> "The duties not to disclose *and not to use* another's trade secret are not, however, necessarily concomitant, though they are frequently found together. Thus, a former employee to whom the secret was communicated in the course of his employment may be under both duties (see Restatement of Agency, §§ 395 and 396). * * * Or the manufacturer may be permitted to use the secret only in the manufacture of products for the owner, with a duty not to disclose the secret *or use it in the manufacture of products on his own account or for others*" (emphasis supplied).

In this case, the Administrator is under a duty not only not to disclose the valuable proprietary data of registrants, but also not to make unauthorized use of such data for the benefit of their competitors. Just as in *Penna. Coal Co.* v. *Mahon* (1922) 260 U.S. 393, Justice Holmes for the Court recognized that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it" (260 U.S. 414), so the use of a trade secret for the benefit of competitors of its owner is the equivalent of its disclosure to them. As a practical matter, the issue presented by this case is no different than if the Administrator made a practice of disclosing trade secrets to competing registrants for the purpose of preparing their applications.

The district court's holding rested in part on its belief that a "persuasive argument" could be made that the patent laws are the exclusive means of protection of proprietary information and that "information, research, and test data which is not patentable simply is not protectable under the Constitution" (Jurisdictional Statement, Appx. A, pp. 18a-19a, fn. 19). In reaching this conclusion, the court inexplicably failed to cite this Court's decision in *Kewanee Oil Co.* v. *Bicron Corp.* (1974) 416 U.S. 470, holding that the patent laws are not the exclusive protection for an enterprise which has utilized its resources and know-how to develop a product which puts it a step ahead of its competitors. The trade secret law also has a vital role to play in overcoming the unfairness and impediment to essential commercial research that would result from unrestricted use of valuable trade secret information. In *Board of Trade* v. *Christie Grain & Stock Co.* (1905) 198 U.S. 236, this Court recognized that:

> "The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. * * * The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach. * * * Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward" (198 U.S. 250-251).

In *A. O. Smith Corporation* v. *Petroleum Iron Works Co.* (6 Cir. 1934) 73 F.2d 531, 539, the court similarly emphasized that although a trade secret may not be patentable, that fact:

> "* * * cannot destroy the value of the discovery to one who makes it, or advantage the competitor who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer" (73 F.2d 538, 539).

The district court in the instant case failed to recognize that the value of a trade secret is equally appropriated to competitors without them "paying the price in labor, money, or machines expended by the discoverer" whether the Administrator directly discloses it to them, or uses it without authority in support of their registration applications.

Moreover, the district court erred in its conclusion that "the data is not transferred by the agency to any third parties." There is nothing in the record to support this conclusion. It is true that section 10(b) of FIFRA on its face prohibits public disclosure of information which "contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential." Despite this mandatory language, however, the Administrator adopted the view that *no* safety or efficacy data submitted pursuant to the registration requirements of the Act is a trade secret, and that such data are required to be publicly disclosed under section 3(c)(2) of the Act (see *Chevron Chemical Company* v. *Costle* (N.D. Cal. 1978) 443 F.Supp. 1024; *Mobay Chemical Corp.* v. *Costle* (W.D.Mo. 1978) 447 F.Supp. 811, 824-827; *Dow Chemical Company* v. *Costle* (E.D.Mich., Civil Action No. 76-10087, Nov. 16, 1977)). Despite judicial repudiation of this untenable position (ibid.) the Administrator has never abandoned his impermissibly restrictive approach to the construction of section 10(b). There was thus no basis for the district court's conclusion that the Administrator does not or will not disclose registrants' trade secrets to their competitors.

III. COMPENSATION FOR THE USE OF PRE-1970 DATA WOULD NOT BE "WINDFALL," BUT IS A CONSTITUTIONAL REQUIREMENT.

There is no support for the district court's view that "granting plaintiff the right to compensation for all data regardless of submission [date] would create a 'windfall' for plaintiff" (Jurisdictional Statement, Appx. A, pp. 20a-21a). The district court apparently based this conclusion on congressional reports suggesting that there was no "reasonable expectation that the law would require sharing of the costs of production" of data submitted before 1970 and that "prior to 1972, the Administrator of the EPA was not prohibited from considering one firm's data to support another firm's application, and did so routinely" (Jurisdictional Statement, Appx. A, pp. 15a-16a, 21a, fns. 14, 22).

The district court disregarded the fact that both under the common law and the Fifth Amendment to the Constitution, a private business *does* have a "reasonable expectation" that government officials will not misappropriate, for the benefit of its competitors, proprietary information that it has submitted in confidence solely in order to comply with regulatory requirements. And a private company *does* have a reasonable expectation under the Fifth Amendment that if such unauthorized conversion of its valuable property occurs, it will at the very least be compensated.[11] Such compensation is not a "windfall." It is a constitutional requirement.

The district court did not explain why compensation for *current* use of pre-1970 data would be a "windfall," whereas compensation for post-1970 data would not be a "windfall." As previously noted (supra, p. 5), the 1970 cut-off date was a legislative compromise which has no constitutional basis. It was, as pointed out in appellant's jurisdictional statement, selected because it had "the virtue of being a round number * * * they compromised on January 1, 1970. Just that simple * * *" (p. 9, fn. 9).

[11]For this reason, the government has recognized that when its contractors, with its consent, make unauthorized use of patented or copyrighted material, the United States is liable for damages because it has "taken" the property in question by eminent domain (see, e.g., *Tektronix, Inc.* v. *United States* (Ct.Cl. 1977) 552 F.2d 343, 346; 28 U.S.C. § 1498).

There is also no evidence in the record to support the district court's assertion that prior to 1970 the EPA "routinely" considered all registrants' data in support of the applications of others. In fact that was not true. Such use, if it occurred at all, was isolated and unusual. That is why there was no judicial controversy over such unauthorized use until the EPA assumed responsibilities for administration of the Act in 1970. And even if there had been instances of such use prior to 1970, that would be irrelevant to the present controversy. Both before and after 1970, the Fifth Amendment at the very least required compensation for such improper use. Even assuming that uncompensated violations of the Fifth Amendment occurred prior to 1970, that fact could provide no basis for permitting their continuation when, as in the present case, they are challenged in court.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and, after hearing, reverse the judgment of the district court.

Respectfully submitted,
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